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**U. S. DISTRICT COURT**  
**N. D. OF N. Y.**  
**FILED**

**SEP 26 2003**

**AT \_\_\_\_\_ O'CLOCK \_\_\_\_\_ M**  
**LAWRENCE K. BAERMAN, Clerk**  
**UTICA**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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CONTEC CORPORATION,

Plaintiff,

-v-

1:03-CV-910

REMOTE SOLUTION CO.,

Defendant.  
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DAVID N. HURD  
United States District Judge

**ORDER**

Pursuant to the oral decision of the Court, entered into the record after hearing oral argument on September 26, 2003, in Albany, New York, it is hereby

ORDERED that

1. The complaint is DISMISSED for lack of subject matter jurisdiction, without prejudice to file an amended complaint on or before October 10, 2003; and
2. The motion and cross motion are DISMISSED as moot, without prejudice to renew within thirty days after the filing of an amended complaint, if any.

IT IS SO ORDERED.

Dated: September 26, 2003  
Utica, New York.

  
United States District Judge

**COPY**

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF NEW YORK

3 -----  
4 CONTEC CORPORATION,

5 Plaintiff,

6 -versus-

03-CV-910

7 (MOTION)

8 REMOTE SOLUTION CO., LTD.,

9 Defendant.  
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14 **TRANSCRIPT OF PROCEEDINGS** held in and for the  
15 United States District Court, Northern District of New York,  
16 at the James T. Foley United States Courthouse, 445 Broadway,  
17 Albany, New York 12207, on **FRIDAY, SEPTEMBER 26, 2003**,  
18 before the **HON. DAVID N. HURD**, United States District Court  
19 Judge.  
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THERESA J. BERICAL, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY

1

2

APPEARANCES:

3

FOR THE PLAINTIFF:

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MCNAMEE, LOCHNER LAW FIRM

5

BY: G. KIMEALL WILLIAMS, ESQ.

6

-and-

7

PENNIE &amp; EDMONDS LAW FIRM

8

BY: KENNETH L. STEIN, ESQ.

9

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FOR THE DEFENDANT:

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NOLAN, HELLER LAW FIRM

13

BY: JUSTIN A. HELLER, ESQ.

14

-and-

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FINGER, SLANINA LAW FIRM

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BY: DAVID FINGER, ESQ.

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THERESA J. BERICAL, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY

Contec v. Remote Solution - 03-CV-910

3

1 (Court convened at 12:37 PM.)

2 THE CLERK: Contec Corporation versus Remote  
3 Solution Company, 03-CV-910.

4 Counselors, your appearance for the record,  
5 please.

6 MR. STEIN: Ken Stein, for Contec  
7 Corporation, from Pennie & Edmonds.

8 MR. WILLIAMS: Kim Williams, from McNamee,  
9 Lochner, Titus & Williams, for Contec Corporation.

10 MR. HELLER: Justin Heller, Nolan & Heller,  
11 on behalf of Remote Solution.

12 MR. FINGER: David Finger, Finger & Slanina,  
13 on behalf of Remote Solution Company, admitted.

14 MR. HELLER: Your Honor, just procedurally,  
15 we filed a pro hac vice motion on behalf of Mr. Finger. I  
16 just don't know whether it has been signed yet.

17 THE COURT: Yes, it has been signed and  
18 Mr. Finger, you are now authorized to practice law in the  
19 Northern District of New York with regards to this case.

20 MR. FINGER: Thank you, your Honor.

21 MR. WILLIAMS: Your Honor, I believe the same  
22 is true for Mr. Stein.

23 THE COURT: All right.

24 MR. STEIN: Good morning, your Honor.

25 Contec's motion seeks to compel Remote Solution to

THERESA J. BERICAL, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY

Contec v. Remote Solution - 03-CV-910

4

1 arbitrate --

2 THE COURT: All right, you're all here now.

3 Let me just get this out of the way right now.

4 The Second Circuit has reminded us District  
5 judges on more occasions than I care to admit that we should  
6 not -- be careful never to go in and take matters without  
7 subject matter jurisdiction. There's been more appeals  
8 where, all of a sudden, the Second Circuit says that there's  
9 no subject matter jurisdiction and why has the District  
10 Judge been spending all this time.

11 Now, in this case, the plaintiff is Contec  
12 Corporation, and I know that you've submitted an affidavit  
13 and reply that the contract at issue here is before Contec,  
14 LP, and you're the successor in interest, but that's not in  
15 the complaint as it stands. And as I see it, until you file  
16 an amended complaint -- and I'll give you time -- that I  
17 have no subject matter jurisdiction on this matter at this  
18 time.

19 And what I am proposing to do is to dismiss  
20 the case without prejudice and give you some time to file an  
21 amended complaint so that I do have subject matter  
22 jurisdiction, and then we can proceed further, because your  
23 complaint does not give me subject matter jurisdiction,  
24 unless you can tell me otherwise. I mean, I know you  
25 replied, and you may very well have jurisdiction under the

THERESA J. BERICAL, RPR, CRR  
UNITED STATES COURT REPORTER - NDNY

Contec v. Remote Solution - 03-CV-910

5

1 proper circumstances, but I don't believe I have it right  
2 now.

3 That's where we stand. And I am not gonna be  
4 subjected to the Second Circuit wondering why I'm hearing  
5 argument and spending my time on this until I do. Can you  
6 tell me why I shouldn't do what I am proposing to do?

7 MR. STEIN: I believe that Contec Corporation  
8 has assumed Contec, LP's rights under the contract.

9 THE COURT: Yes, I know what you said. But  
10 the contract, as alleged in the complaint, is between  
11 Contec, LP, and Remote Solutions, and there's nothing of  
12 what you're telling me that's in the complaint. What you  
13 have said in reply may very well give me subject matter  
14 jurisdiction, but it's not in the complaint and that's where  
15 we start with and that's where they would have an  
16 opportunity to challenge this or whatever. But it's not in  
17 the complaint, and at the moment, it's a collateral issue.

18 MR. STEIN: I believe that the complaint does  
19 say that the agreement's between Contec Corporation and  
20 Remote Solution.

21 THE COURT: Well, who is the contract  
22 between? Who are the two parties to the contract that  
23 you're trying to enforce?

24 MR. STEIN: The original parties that signed  
25 the contract were Contec, LP, and Remote Solution. Contec,

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1 LP, changed form, first to Contec, LLC, and then changed  
2 form to Contec Corporation.

3 THE COURT: Is that in the complaint?

4 MR. STEIN: What?

5 THE COURT: Is that in the complaint?

6 MR. STEIN: I don't believe that those two  
7 facts are in the complaint, but the complaint refers only to  
8 the contract between Contec Corporation, which is the only  
9 entity that exists at the present time, and Remote Solution.

10 THE COURT: Do you have the contract? Who is  
11 the contract between?

12 MR. STEIN: At the time the contract was  
13 signed, it was between Contec, LP, and Remote Solution.

14 THE COURT: Okay.

15 MR. STEIN: Contec, LP, no longer exists. It  
16 changed form to LLC and then to the Corporation.

17 THE COURT: Is that in the complaint? Did  
18 that situation, that you have a contract that now you are  
19 representing the successor in interest to that, is that in  
20 the complaint? I mean, we have two separate entities here  
21 is what I'm faced with in the complaint. You have the  
22 contract with Contec, LP, but the plaintiff here is Contec  
23 Corporation.

24 MR. STEIN: Right. I think that the  
25 complaint only alleges that there's an agreement between

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1 Contec Corporation at this point and Remote Solution, which  
2 I believe is accurate.

3 THE COURT: It's not accurate. The contract  
4 is between Contec, LP, and Remote Solution.

5 MR. STEIN: Right. But Contec Corporation  
6 assumed the rights of Contec, LP, under the agreement, so I  
7 think it is -- I believe it's --

8 THE COURT: Why not file an amended complaint  
9 and get that straightened out so we don't have any issue  
10 here? I am willing to give you time to file an amended  
11 complaint.

12 MR. STEIN: Okay.

13 THE COURT: But I just believe that there's  
14 some ambiguity here. And I don't know what the defendant's  
15 position is in regards to that issue. They raised the  
16 question here in their response, you raised the issue.

17 Well, let me hear from the defendant. What's  
18 your position on this matter? You raised the issue, and I  
19 just want to be sure that if I go through the effort of  
20 deciding this case on the merits that I have jurisdiction.  
21 That's all I want. And do you agree to accept an amended  
22 complaint? Or what's your position?

23 MR. FINGER: Your Honor, again, first,  
24 initially, let me thank the Court for allowing me to  
25 practice here today.

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1 I think there's another issue that adds to  
2 your Honor's concern. Although it's not stated in any of  
3 the papers, the Contec Corporation is not a New York entity,  
4 it's a Delaware entity. They have not said that in the  
5 papers. And so, under the Federal Arbitration Act, the law  
6 of that does not confer subject matter jurisdiction. So,  
7 there is a diversity issue that has to be established  
8 factually.

9 And I agree, the Court doesn't have  
10 jurisdiction, because it doesn't have facts in the complaint  
11 establishing a prima facie right on behalf of Contec  
12 Corporation. We believe that your Honor's approach is  
13 appropriate, that the matter should be dismissed without  
14 prejudice, allow them to file a new action, new complaint,  
15 and we are happy to go from there.

16 THE COURT: All right. Mr. Stein, do you  
17 want to be heard further before I -- I mean, this is --

18 MR. STEIN: Yes, I would. As to the new  
19 point Mr. Finger just raised about Contec Corporation, the  
20 complaint says, in paragraph one, that Contec Corporation is  
21 a Delaware corporation. And that's yet another argument  
22 that he's raising --

23 MR. FINGER: Your Honor, he's right, it does  
24 say in the complaint. I was in error. It does refer to a  
25 Delaware corporation, I apologize.

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1 THE COURT: All right.

2 MR. STEIN: I guess I'm just wondering if  
3 it's possible for me to -- because I haven't thought about  
4 this issue before. In fact, before the opposition was filed  
5 by Remote Solution, there was never any disagreement on the  
6 part of Remote Solution that the agreement at issue here  
7 applied to Contec Corporation as Contec Corporation. I  
8 think that's well-established by the evidence that I put  
9 forward in the reply brief.

10 THE COURT: As I said before, the Second  
11 Circuit warns us and wants us to sua sponte check subject  
12 matter jurisdiction. They get very upset when there's an  
13 appeal and it turns out there's no subject matter  
14 jurisdiction and the parties and the judge did not raise it.  
15 And we're supposed to look into these issues right away so  
16 that it doesn't go to the Second Circuit after a two-week  
17 trial and then, finally, somebody, the losing party usually,  
18 will all of a sudden come up to the Second Circuit and raise  
19 the issue that, gee, there was never subject matter  
20 jurisdiction. Well, they get sanctioned for not raising the  
21 issue earlier, but the whole case then gets thrown out and  
22 two weeks are wasted. And that's just what I look like I'm  
23 facing here.

24 And so, I believe I know what I am going to  
25 do and I am ready to do it, unless either one wants to --

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1 MR. STEIN: Well, I have two requests. One  
2 request is that I can go back to the office to look into the  
3 issue and maybe convince you that there is subject matter  
4 jurisdiction by filing a paper. And the second is if we  
5 could just file the amended complaint without dismissing the  
6 originally-filed complaint.

7 THE COURT: Anything further?

8 MR. WILLIAMS: Your Honor, just two  
9 observations: One is the complaint does allege a contract  
10 with Contec and Remote; that's admitted in the answer. The  
11 answer says there was such a contract. The motion papers  
12 served by Remote say the same thing. That's what's on the  
13 face of the complaint. What the Court is doing looking at  
14 the underlying documents, I understand that, but the other  
15 point I make, your Honor, I believe the parties are all  
16 here, the issue is fully briefed, it's a matter of a  
17 technicality, at best. I think we can amend nunc pro tunc  
18 now and decide the matter which is otherwise to be decided.

19 THE COURT: All right. Contrary to what you  
20 just said, Mr. Williams, this is not merely a technicality.  
21 This is a matter whether I have jurisdiction or authority to  
22 do anything in this matter. And as we now stand, pursuant  
23 to Federal Rule Civil Procedure 12(h)(3), an action must be  
24 dismissed when it appears that subject matter jurisdiction  
25 is lacking. Here, plaintiff seeks relief based upon an

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1 admitted contract between Contec, LP, regardless of what's  
2 in the complaint, and defendant Remote Solution. The  
3 plaintiff, Contec Corp., is not a signatory to the contract  
4 and, therefore, lacks standing to assert rights under it.  
5 No reference is made in the complaint to Contec, LP, at all.

6 Contec Corporation argues in reply that it is  
7 the successor in interest to Contec, LP, and Contec, LLC,  
8 and, therefore, is a party to the agreement. Further,  
9 Contec Corp. contends that Remote Solution waived any  
10 objection to an assignment of contractual rights or is  
11 equitably estopped from asserting that the mere change of  
12 corporate form constitutes an assignment prohibited by the  
13 agreement.

14 While it appears that Contec Corp. may be  
15 correct, that a change in corporate form, i.e., a successor  
16 in interest would not conflict with the nonassignment  
17 clause, it still appears, from the face of the complaint,  
18 that subject matter jurisdiction is lacking. In fact, at  
19 present, subject matter jurisdiction is, in fact, lacking.

20 Therefore, the complaint will be dismissed,  
21 without prejudice, to file an amended complaint asserting  
22 proper subject matter jurisdiction on or before October 10,  
23 2003. The motion and cross-motion in this case are  
24 dismissed as moot, without prejudice, to renew within  
25 30 days after the filing of the amended complaint, if any.

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1                   This is the decision of the Court. No  
2 written decision will follow. A summary order will be  
3 filed.

4                   Anything further, gentlemen?

5                   MR. HELLER: No, Judge.

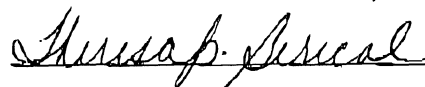
6                   MR. STEIN: No, your Honor.

7                   (This matter adjourned at 12:52 PM.)  
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CERTIFICATION:

I, THERESA J. BERICAL, RPR, CRR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and cause the same to be transcribed; that the foregoing is a true and correct transcript of the same and the whole thereof.



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Official Court Reporter

DATE: October 2, 2003

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